UNITED STSTES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RANDOM ACQUISITIONS, LLC.,

Respondent,

and

Case No.: 7-CA-52473

SHERRIE CVETNICH, an individual,

Charging Party.

RESPONDENT, RANDOM ACQUISITIONS INC'S., EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent RANDOM ACQUISITIONS INC., (hereinafter "Respondent"), by and through undersigned counsel, and pursuant to National Labor Relations Board Rules and Regulations Section 102.46, submits Respondent's exceptions to the Decision of the Administrative Law Judge in the above captioned case, dated March 21, 2011, (hereinafter "Decision"), and states as follows:

On March 21, 2011, the Administrative Law Judge (hereinafter "ALJ") issued a Decision finding that Respondent: 1) is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; 2) the Respondent, by discharging Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich on October 16, 2009, has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, and; 3) the unfair labor practices set for the above affect interstate commerce within the meaning of the Section. (Decision pg. 27).

Respondent respectively submits the following exemptions to the Decision by the ALJ, and submits that the Decision should be reversed for the following reasons:

1

Exception 1: Whether the ALJ improperly relied upon the answer to paragraph 8 of the Complaint. On March 13, 2011, the Respondent filed a Motion to Amend Answer to Conform to the Evidence (hereinafter "Motion"). As of the date of these exemptions, said Motion has not been ruled upon. The granting of said Motion will materially change the basis upon which the ALJ formed his Decision.

The parts of the Decision to which this objection is made are found on pp. 14 fn. 52 and p. 17 of the Decision.

Argument and Citation of Authority in Support of Exception No. 1

By Decision dated March 21, 2011, ALJ, Mark Rubin, found that the Claimants were employees of the Respondent, and that Respondent discharged the Claimants on October 16, 2009, in violation of the rights guaranteed by the Act. The date of termination of all three Claimants was disputed by Respondent of at trial of this matter. However, in finding against the Respondent, the ALJ relied in substantial part on Respondent's Answer to paragraph 8 of the Complaint as follows:

As discussed herein the Complaint pleads and the Respondent's Answer admits that in fact Sherrie Cvetnich, Burge, and Eric Cvetnich were discharged by the Respondent on October 16th.

Decision, p.14. fn 52.

In paragraph 8 of the Complaint, the regional director alleges as follows: On October 16, 2009, Respondent terminated its employees, the charging party, Eric Cvetnich and Theresa Burge. The Respondent's Answer in the response to the said allegation is as follows: "Respondent admits same." The Answer of the Respondent was filed two days before the trial by the same counsel who presented the Respondent's defense at trial and now argues in brief that the Cvetnichs are not employees. In the Complaint paragraph 8, which Respondent admitted in its entirety didn't just allege that the Cvetnichs were terminated by the

Respondent, but that the Cvetnichs were employees of the Respondent.

The Respondent's answer admitting the status of Sherrie and Eric Cvetnich is binding upon the Respondent. In <u>D.A.</u> Collins Refractories, 272 NLR 931 (1984), the board held as follows in respect to the effect of such admission in a party's answer: "The judge was correct in holding that a statement by a party pleading is an admission. It is also true that a statement and a pleading constitutes a "judicial" admission that is binding on the party making the admission . . . it is also well established, however, that when an amended pleading is filed, the "judicial" admission loses it binding effect. No amended pleading was filed or moved by the Respondent, and the argument contained in its brief does not constitute such.

Decision, p. 17.

Notwithstanding the ALJ's findings, there was extensive evidence presented at trial in support of Respondent's position that the Claimants were not statutory employees, and that the Claimants were discharged prior to October 16, 2009. Tim Hogan testified he told Hogarth Joseph "that we need to fire these people." (TR 341) Additionally, Hogan told Joseph that he did not know who Sherrie Cvetnich and Theresa Burge were, and that he did not want them working in the building. (TR. 239, 240). Therefore, at Tim Hogan's direction, on October 5, 2009, Hogarth Joseph called Linda Tessin and told her, "that this was the last week for Theresa Burge and Sherrie Cvetnich to work at Heritage Tower, and they were not to be there after that week." (TR. 242, 255, 256, 365). Linda Tessin's response to Hogarth was "ok" (TR. 256). Later that same day, Joseph's wife, who handled his email correspondence for Heritage Tower, also received an email from Linda Tessin, in which Linda Tessin acknowledged that her employees had been "laid off". (TR. 242-243).

On April 13, 2011, the Respondent requested leave to amend its answer to paragraph 8 of the Complaint to conform to the evidence presented at the hearing, by denying paragraph 8

insofar it alleges the complainants, Sherrie Cvetnich, Theresa Burge, and Eric Cvetnich, were terminated on October 16, 2009. Also, insofar as it alleges Sherrie Cvetnich and Eric Cvetnich were statutory employees of the Respondent.

The board should grant the Respondent's Motion because: 1) The board should freely grant leave to amend to permit parties to have their claims determined and heard on the merits; 2) Respondent extensively litigated the date of termination at trial without objection by General Counsel, and also presented evidence that substantially disputes the statutory employment status of Sherrie Cvetnich and Eric Cvetnich; 3) Amendment is clearly required in the interest of justice to properly frame issues on appeal, and; 4) General counsel will not be prejudiced by this amendment, insomuch as the subject evidence was introduced at trial and General Counsel had a full opportunity to respond thereto. Furthermore, as shown above, the Decision of the ALJ relied heavily on the answer to paragraph 8 of the Complaint. If the Motion is granted the primary basis upon which the ALJ formed his Decision will change.

Granting Respondent's Motion is within the discretion of the National Labor of Relations Board (NLRB). NLRB Rule 102.23 states, "... Whether or not the complaint has been amended, the answer may, in the discretion of the administrative law judge or the Board, upon motion, be amended upon such terms and within such periods as may be fixed by the administrative law judge or the Board." See also, Frito Co., W. Div. v. NLRB, 330 F. 2d 458 (1964). ("Court remanded because the Board had authority to allow, over General Counsel's objection, an amendment to conform to the evidence admitted in the record because it was a judicial function"); Ertel Mfg. Corp., 147 NLRB 312, 328 (1964) (Where the complaint alleged layoff occurred on May 31, 1963, this allegation was amended to conform to the testimony that a discharge occurred on May 22, 1963).

In the present case, justice clearly requires that the court also grant leave to amend the Answer. First, only by granting Respondent's Motion will the issues that were actually raised and litigated before the ALJ be properly framed for appeal. Second, as alleged in the Motion, Respondent's failure to earlier move to amend the Answer to Paragraph 8 of the Complaint was the result of inadvertency by counsel. However, if the ALJ's view of the effect of Answer 8 is accepted, the Respondent may be precluded from presenting critical issues on appeal, despite the fact that these issues were fully litigated at trial and Respondent's position has substantial support and evidence of record. Livingston Powdered Metal, Inc. v. NLRB, 669 F. 2D 133, 136 (3rd Cir.1982) ("Section 10(e) is intended to prevent litigant from raising a matter in the courts which had never been presented to the board for it's consideration – a circumstance not presented in this case."); Pincus Elevator and Electric Co., 308 NLRB 684, 685 ("As the matter has been fully litigated and the amendment conforms to the complaint and the evidence, the judge should have granted the motion to amend"). Respondent respectfully submits that it would also be contrary to the express directive of the Board's rules "shall be liberally construed to effectuate the purposes and provisions of the act." 29 C.F.R. 102.121.

The Respondent submits that the Decision of the ALJ rested heavily upon the Answer submitted by the Respondent. As of the date of this Brief, no order has been entered either granting or denying the Respondent's Motion. Furthermore the issue of the Claimants' employment status was extensively litigated at the hearing without objection from the General Counsel. As a result, the Respondent respectfully submits that the Decision should be reversed and Respondent's Motion should be granted in order to properly frame the issues for appeal of this matter.

Exception 2: Whether the Claimants were discharged prior to October 16, 2009, and as a result, the conduct of Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich (hereinafter collectively "Claimants") on October 16, 2009, was not protected under the Act and therefore was not in violation of the Act.

The parts of the Decision to which this objection is made are found on pgs. 16, 22 of the Decision.

The portions of the record on which this exception is based are: Transcript (hereinafter "TR") pp. 242- 24, 255, 256, 365; Respondent's Exhibit 3.

Argument and Citation of Authority in Support of Exception No. 2.

The Respondent respectfully submits that competent substantial evidence was presented at the hearing of this matter showing that the Claimants' employment was terminated prior to October 16, 2009. As a result, the conduct of the Claimants on October 16, 2009, cannot be the basis of a violation of the Act. Therefore, the Decision of the ALJ should be reversed and judgment should be entered in favor of the Respondent.

At the hearing, Tim Hogan testified he told Hogarth Joseph, "that we need to fire these people." Hogan also said, "my asset is getting destroyed" and "my company's being fleeced." (TR. 341). Tim Hogan told Hogarth Joseph that he was getting ripped off, "that he was very upset about the situation at the building and was concerned that more things were going to be ruined there." (TR. 236). Additionally, Hogan told Joseph that he did not know who Sherrie Cvetnich and Theresa Burge were, and that he did not want them working in the building. (TR. 239, 240).

Therefore, at Tim Hogan's direction, on October 5, 2009, Hogarth Joseph called Linda Tessin and told her, "that this was the last week for Theresa Burge and Sherrie Cvetnich to work

at Heritage Tower, and they were not to be there after that week." (TR. 242, 255, 256, 365). Linda Tessin's response to Hogarth was "ok" (TR. 256). Later that same day, Joseph's wife, who handled his email correspondence for Heritage Tower, also received an email from Linda Tessin, in which Linda Tessin acknowledged that her employees had been "laid off". (TR. 242-243).

In addition, Respondent's Exhibit 3, an email, dated October 5, 2009, from Darci Joseph to Linda Tessin, specifically shows that the Claimants were "laid off" prior to October 16, 2009. In the email Linda Tessin states, "To my knowledge we are paying no one to host the website. It was set up about 12 years ago. Looked [sic] for a file after all my staff was laid off. But it <u>IS</u> empty. Sorry I can't be more help with this." (emphasis supplied). Under re-direct Linda Tessin explained that she was referring to employees that were laid off twelve years prior to 2009. However, Respondent respectfully submits that Linda Tessin's explanation make is nonsensical: If Linda Tessin was referring to an incident the occurred twelve years prior to 2009, she should have stated, that she looked for a file after all of her staff was laid off but it <u>WAS</u> empty rather than <u>IS</u> empty, as she stated in the October 5, 2009 email to Darci Joseph. When viewed in that light, the email clearly shows that Linda Tessin was referring to the claimants in this case and that the claimants were laid off on or before October 5, 2009.

As a result, the claimants' concerted activity, occurred after they were discharged by the Respondent, and is therefore not protected by the Act, and cannot be the basis for an action pursuant to the Act. Therefore, the Decision of the ALJ should be reversed, and judgment should be entered in favor of the Respondent.

Exception 3: Whether under the Wright Line analysis the Respondent did not violate the Act because the Claimants were going to be discharged in the absence of the alleged protected conduct.

The parts of the Decision to which this objection is made are found on pp. 16, 20 - 25 of the Decision.

The portions of the record on which this exception is based are: TR pp. 63, 66, 145-146, 150, 170, 204, 236, 239-240, 242, 255, 263, 270, 275, 276, 278- 282, 284, 285-287, 294, 298-299 329, 339-344, 346, 349-353, 362-365.

Argument and Citation of Authority in Support of Exception No. 3

If it is accepted that the Claimants were terminated on October 16, 2009 ¹, and not prior thereto, the Decision of the ALJ should be reversed because the evidence presented at trial clearly shows that the Respondent would have discharged the Claimants despite the alleged protected conduct that took place on October 16, 2009. "If the discharge would have occurred absent the protected activity, it is clear no unfair practice existed since a bad motive without effect is no more unfair labor practice then unexecuted evil is a crime." NLRB v. Wright Line, A Division of Wright Line, Inc., 662 F. 2d 899, 903 (1st Cir. 1981); see also, NLRB v. Transp. Mgmt. Bd., 462 U.S. 393 (1983).

Specifically, the Respondent had a reasonable basis to discharge (and Respondent asserts that they were in fact discharged prior to October 16, 2009) the Claimants for the following reasons: 1) Linda Tessin's decision to contract out the canopy removal work to a contractor that employed her son, rather than to a competitor that offered to repair not just remove the canopy for about the same price, (Decision p. 7 lns. 10-15); 2) the Claimant's cutting of a check to her son for the canopy removal work, thereby causing a check to Consumer Energy to be returned by

¹ A fact the Respondent disputes and concedes here only for the sake of argument.

the bank. (Decision p.7 lns. 5-10); opening supplier credit accounts of applications that contained the forged signature of Tim Hogan. (Decision pg 7 lns. 25-31); 4) the incident on October 15, 2009, involving the sheriff's visit to Heritage Towers in order to execute on Respondent's property due to Linda Tessin's personal garnishment, about which she did not inform Tim Hogan (TR. 273-283).

Furthermore, the testimony offered at trial clearly shows that the Respondent intended to For example: Tim Hogan believed there was foul play being discharge the Claimants. perpetrated on Respondent by Linda Tessin and concert with her relatives at Heritage Tower (TR. 341, 343-344); Tim Hogan testified at the hearing he felt he had "made a huge mistake by trusting Linda Tessin." (TR. 341); Tim Hogan testified he told Hogarth Joseph "that we need to fire these people." Hogan also said, "my asset is getting destroyed" and "my company's being fleeced." (TR. 341); Tim Hogan told Joseph that he was getting ripped off, "that he was very upset about the situation at the building and was concerned that more things were going to be ruined there." (TR. 236). Hogan told Joseph that he did not know who Sherrie Cvetnich and Theresa Burge were, and that he did not want them working in the building. (TR. 239, 240); At Tim Hogan's direction on October 5, 2009, Hogarth Joseph called Linda Tessin and told her, "that this was the last week for Theresa Burge and Sherrie Cvetnich to work at Heritage Tower and they were not to be there after that week." (TR. 242, 255, 256, 365); Linda Tessin's response to Hogarth was "ok" (TR. 256); Later that same day, Joseph's wife, who handled his email correspondence for Heritage Tower, also received an email from Linda Tessin, in which Linda Tessin acknowledged that her employees had been "laid off". (TR. 242-243).

It is clear, from the evidence produced at trial, that the due to the "dire" financial circumstances of the Respondent, the actions of Linda Tessin, and the statements made regarding

Tim Hogan's overall distrust of the Claimants, that the Respondent intended to discharge the Claimant's whether or not the alleged protected activity of October 16, 2009, had occurred. As a result, pursuant to Wright Line, the Decision of the ALJ should be reversed and judgment should be entered in favor of the Respondent.

V. Conclusion

The Respondent respectfully submits the for the foregoing reasons the Decision of the ALJ should be reversed, No ruling has been made on Respondent's Motion to Amend Answer to Conform to the Evidence. This is an issue having significant impact on the Decision of the ALJ as the Respondent's responses in the Answer were heavily relied upon by the ALJ in his Decision. The evidence presented at the trial of this matter clearly shows that the Claimants were discharged prior the October 16, 2009, and as a result their conduct of October 16, 2009, is not protected by the Act. Furthermore, the evidence presented at trial clearly shows that the Respondent intended to discharge the Claimants even in the absence of the conduct of October 16, 2009.

Respectfully submitted this 3rd day of June, 2011.

JEREMIAH J. TALBOTT, P.A.

245 East Intendencia Street Pensacola, Florida 32502

(850) 437-9600 (Voice)/(850) 437-0906 (Fax)

Fla. Bar No. 0154784

Certificate of Service

I certify that on June 3, 2011, I served the forgoing Exceptions to the Administrative law Judge's Decision on the following parties of record via U.S. Mail: Joseph Canfield, Patrick V. McNamara Federal Building, Room 300, 477 Michigan Avenue, Detroit Michigan 48226.

JEREMIAH J. TALBOTT, P.A. 245 East Intendencia Street

Pensacola, Florida 32502 (850) 437-9600 (Voice)

(850) 437-0906 (Fax) Fla. Bar No. 0154784